

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60139
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY GREEN,

Defendant-Appellant.

Appeal from United States District Court
from the Northern District of Mississippi
(CR-4:93-133-1-B-0)

June 21, 1995

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Roy Green appeals his convictions for violating extortion, narcotics, and firearm statutes pursuant to 18 U.S.C. §§ 371, 1951, and 924(c); and 21 U.S.C. § 841. For the following reasons, Green's convictions are affirmed.

BACKGROUND

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

On October 27, 1993, a grand jury indicted Roy Green for: (1) conspiracy to violate extortion, narcotics, and firearms statutes in violation of 18 U.S.C. § 371; (2) extortion under color of official right in violation of 18 U.S.C. § 1951; (3) possession with intent to distribute one-half kilogram of cocaine in violation of 21 U.S.C. § 841; and (4) carrying and using a firearm during and in relation to a crime of violence and a drug trafficking crime in violation of 18 U.S.C. § 924. These charges arose from the planned extortion of money and cocaine from two alleged drug couriers by Roy Green and Derrick Hughes, both of whom, at the time of the crime, were deputies with the Washington County, Mississippi Sheriff's Department. Co-defendant Derrick Hughes pleaded guilty prior to trial and testified against Green.

After a jury trial, Green was convicted on all four counts. He was sentenced to a total of 138 months of imprisonment and a three-year term of supervised release. Green appeals his convictions.

DISCUSSION

ISSUE 1:

Green argues that the evidence was insufficient to support his conviction for possessing a firearm during and in relation to a drug-trafficking offense. Green contends that, as a police officer, he was required to carry the firearm while on duty. According to Green, the Government had to prove that Roy possessed the gun unlawfully, and the court erred when it did not so instruct the jury.

Green moved for a judgment of acquittal and filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 within seven days of the jury's guilty verdict, which was denied. The standard for evaluating the sufficiency of the evidence is that enunciated in United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983):

It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

This court views direct and circumstantial evidence adduced at trial, as well as all inferences reasonably drawn from it, in the light most favorable to the verdict. United States v. Sanchez, 961 F.2d 1169, 1173 (5th Cir.), cert. denied, 113 S. Ct. 330 (1992).

As the Government correctly points out, Green's argument is premised on cases decided before a 1984 amendment to 18 U.S.C. § 924(c) which removed the unlawfully carrying of a gun as an element of the offense. See 18 U.S.C. § 924(c). In order to obtain a conviction under § 924(c), the Government must prove beyond a reasonable doubt that (1) Green committed the drug-trafficking crime, (2) he knowingly used or carried a firearm, (3) during and in relation to that crime. United States v. Willis, 6 F.3d 257, 264 (5th Cir. 1993). "Conviction under [18 U.S.C. § 924(c)(1)] does not depend on proof that the defendant had actual possession of the weapon or used it in any affirmative manner[,] [but only that] the firearm was available to provide protection to

the defendant in connection with his engagement in drug trafficking." Id. (internal quotation and citation omitted).

To establish a nexus between the firearm and the drug-trafficking offense, it is not necessary for the Government to prove that the gun was actually used or brandished; the evidence is sufficient if it shows that "the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others . . ." United States v. Coburn, 876 F.2d 372, 375 (5th Cir. 1989).

The evidence supports the jury's verdict. Trial testimony showed the following: Chris Collins, an acquaintance of Green's, agreed to cooperate with the Government after he was arrested by federal and state agents for distribution of crack cocaine. Green was a full-time deputy sheriff for Washington County in Mississippi. On the evening of August 8, 1993, Green arrived at a bar where Collins was employed as a "security" guard, and discussed a plan to have Collins advise Green when known drug couriers carrying cocaine were to arrive in the county. The plan involved Green stopping the carriers, taking their money and dope, and releasing them, after which the money would be divided between Collins and Green. Collins would then sell the confiscated cocaine and share the proceeds with Green. Collins contacted the Greenville police department and related Green's plan. Collins agreed to act in an undercover capacity and to wear a wire when meeting with Green.

Green solicited the help of another deputy, Derrick Hughes, to assist in the plan. At a prearranged time and place, Green and Hughes met two undercover drug couriers with Collins sitting in their vehicle. Green and Hughes approached the vehicle. Green then pulled his service revolver and pointed it at Collins and the two undercover officers. Hughes testified that Green deviated from standard arrest procedures by drawing his firearm and pointing it at the individuals without first giving them the commands to get out of the vehicle with their hands visible.

The two undercover agents were searched, as was their vehicle. Six Hundred dollars and a half kilogram of cocaine were seized. Hughes returned \$20 to the agents for gas money back to Memphis, and they were told to leave the county and never come back. Hughes gave Collins the cocaine for resale. The \$600 was divided between Collins, Green, and Hughes. The next day Collins met with Hughes to divide the purported proceeds from the sale of the cocaine. While en route downtown to Green's office with the money, Hughes was arrested. Upon being arrested, Hughes confessed.

From the testimony at trial, a reasonable trier of fact could have found that Green used his service revolver to intimidate the purported drug couriers into handing over cocaine, thereby satisfying the elements of § 924(c). Thus, this contention has no merit.

ISSUE 2:

Green argues that he was denied effective assistance of trial counsel because his lawyer failed to introduce a transcript of a

taped conversation between Green's co-defendant and an informant, failed to introduce certain evidence, failed to call Green as a witness or any witnesses, failed to present a defense, and waived closing argument. This court resolves allegations of inadequate representation raised on direct appeal only when the record permits the court to evaluate fairly the merits of the claim. United States v. Andrews, 22 F.3d 1328, 1345 (5th Cir.), cert. denied, 115 S. Ct. 346 (1994). Ordinarily, if the claim of ineffective assistance of counsel is not raised in the trial court, the issue is not sufficiently developed on the record. Id.

Roy did not raise the ineffective-assistance-of-counsel claim in the trial court, nor is the record developed sufficiently to evaluate fairly Green's challenge to his trial counsel's strategy. Accordingly, this court need not review this issue.

CONCLUSION

For the foregoing reasons, Green's convictions are AFFIRMED.